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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1379

FRANK CLIFFORD STATEN, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Your petitioner Frank Clifford Staten, Jr. respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled cause on February 6, 1980 which judgment affirmed the judgment of conviction of the United States District Court for the Southern District of Texas wherein petitioner was convicted of embezzling and stealing a truckload of rice in violation of Title 18, United States Code, Section 659.

Citation to Opinion Below

The opinion of the United States Court of Appeals for the Fifth Circuit is set forth in Appendix A infra. It has not as yet been officially reported.

Jurisdiction

The judgment of the Court of Appeals was entered on February 6, 1980. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254.

Questions Presented for Review

A. Was not the jury verdict in this case against the weight of the evidence as it was inconsistent?

B. Did not the trial judge err when he permitted the indictment caption to be submitted to the jury?

Statement of the Case

A two count indictment was returned against the petitioner Frank Clifford Staten, Jr. in the United States District Court for the Southern District of Texas (Houston Division) charging him with embezzling and stealing certain rice in violation of 18 U.S.C. § 659 (Count One) and transporting stolen goods in interstate commerce in violation of 18 U.S.C. § 2314 (Count Two). Following a jury trial the petitioner was convicted under Count One and acquitted under Count Two. He was thereafter sentenced to a custodial term of two years.

All of the factual testimony in this case was adduced through government witnesses.

John Jackson, who is the owner of a trucking company known as Jackson & Johnson Inc. in Savannah, New York stated that one of his trucks was stolen in October 1978 from the company branch office in New Jersey. (T7)[1] The trailer was registered in Maine and bore the license plate number 350088. (T24) On cross-examination he was shown a document purporting to show a lease of the trailer in question from Jackson & Johnson to appellant. The witness denied the authenticity of that document (T31) and further stated that his company did not lease trailers. (T32)

Several witnesses were called who were in the employ of Uncle Ben's Food in Houston. Don Lednecker, the shipping manager, stated that the petitioner identified himself as Morris Gibson on March 9, 1979 and picked up a load of rice to be transported to Seattle. (T43-T45) The load never reached its destination. (T46) Richard Keener, a packaging clerk, stated that the petitioner picked up a load on March 9, 1979 and signed for it with the name of Morris Gibson. (T46) He further stated that he had seen petitioner in November 1978 in connection with another shipment of rice at which time he used the name Frank Staten. This load of rice was delivered to its destination in Florida by petitioner. (T68-T70) John Holiman, a packaging clerk, stated that petitioner appeared at the Uncle Ben plant on May 6, 1979 at 11:30 p.m. to pick up a load of rice. He advised him to return at 4 a.m. (T142-143) Petitioner did not give him a name. (T149) He was driving a trailer with Maine plate No. 350088. (T148)

Steve Bramel, a truck broker in Houston, stated that he received a telephone call from a Morris Gibson in

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[1] Reference is made to the trial transcript which was filed in the Court of Appeals.

March, 1979 who was looking for a load to deliver. (T95) The witness sent Gibson (he never met him in person) to Uncle Ben to pick up the load which was the subject matter of the first count of the indictment. In May, 1979 Gibson called him again and he arranged for another load to be delivered from Uncle Ben. He then notified the federal authorities. (T107) He also stated that he personally met the petitioner in November, 1978 and arranged for a load to be delivered from Uncle Ben to Jacksonville, Florida. This shipment was delivered. (T113-T117)

Two federal agents testified in this matter. Agent Tom Bevins stated that he saw the petitioner driving a tractor trailer a short distance from the Uncle Ben plant on May 7. (T159) He asked the petitioner to drive the vehicle into the plant. (T160) The driver identified himself as Frank Staten (T159) and advised that he had rented the trailer. The driver denied knowing a Morris Gibson. (T166)

Dennis Ploegers, also a federal agent, stated that he searched the tractor trailer between 9:30 a.m. and 11:00 a.m. on May 7. He found a medical certificate issued to a Morris Gibson in the tractor. (T170) He admitted however that the tractor trailer remained unattended at the Uncle Ben plant for some 8-9 hours before his arrival and that the vehicle was unlocked. (T172; T175) No federal agents were in the area during this time and he candidly stated that he did not know who, if anyone, had access to the vehicle. (T181-183)

Reasons for Granting the Writ

A. The undersigned is cognizant of the rationale of *United States* v. *Dunn,* 284 U.S. 390 (1932) and *Steckler* v. *United States,* 7 F.2d. 59 (2d Cir. 1925). As stated in *Dunn*:

> "Consistency in the verdict is not necessary. Each count in an indictment is regarded as if it was a separate indictment." (*Supra* at p. 393)

See also Comment, 60 Colum. L. Rev. 999 (1960). As also stated by Justice Frankfurter in *United States* v. *Dotterweich,* 320 U.S. 277, 279 (1943):

> "whether the jury's verdict was the result of carelessness or compromise. . . . is immaterial. Juries may indulge in precisely such motives or vagaries."

In the instant case the argument of an inconsistent verdict is offered only in the context of a verdict which is against the weight of the evidence. The evidence in the instant case required the jury (if a conviction is to be sustained) to believe that the petitioner was Morris Gibson on March 9, 1979 (in the first count) and that the petitioner transported a stolen trailer on March 9, 1979 in interstate commerce knowing it to be stolen (on the second count). The only tangible evidence consists of the possession by the petitioner of the stolen trailer in May, 1979 when he was arrested. The evidence concerning the events of March 9 is that Morris Gibson drove the same trailer into the Uncle Ben plant on that date and picked up a load of rice. How could the jury find Staten not guilty of the possession of the trailer on March 9 and guilty of stealing the rice in that same trailer on that same day? A hypothetical may better illustrate this point. If petitioner were charged with shooting

someone with a weapon and possessing a weapon at the time of the shooting—how could he be convicted of the shooting and acquitted of the weapon charge? The rice shipment on March 9, 1979 had to be removed by trailer on March 9. Since the jury acquitted petitioner on Count Two (and thereby disregarding the evidence dealing with the identification of the vehicle driven by Gibson) the crime charged in Count One could not have taken place.

On the basis of this inconsistency in the jury verdict it is respectfully submitted that the conviction of petitioner on Count One must be rendered against the weight of the evidence and set aside.

B. As previously noted the key issue for jury determination in Count One was whether petitioner and Morris Gibson were one and the same. The Government chose to caption the indictment in this case as follows:

> *"United States of America* v. *Frank C. Staten, Jr. a/k/a Morris Gibson."*

This caption was clearly prejudicial to the petitioner as it presumed that Staten and Gibson were the same person. Trial counsel for petitioner was able to convince the court of this prejudice at the outset of the trial and the caption was deleted by the trial court. (T4) However, at the conclusion of the case, the court, despite the objection of counsel, permitted the jury to receive the entire indictment (which, of course, included the caption). (T200) The precise effect of having the jury see the indictment caption cannot be here shown. However the inference can be drawn that they examined the indictment and that as a result thereof became aware of the caption. As stated, the caption presumes to state that Staten and Gibson are one. The Government's burden was to prove the same fact. The prejudice to petitioner is obvious on its face. Accordingly the verdict should be set aside.

CONCLUSION

For the foregoing reasons this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

PETER S. VALENTINE,
Counsel for Petitioner.

SCHUTZMAN & VALENTINE,
Attorneys for Petitioner.

[APPENDIX FOLLOWS]

APPENDIX A

Opinion and Judgment of the United States Court of Appeals

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 79-5414

Summary Calendar*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FRANK CLIFFORD STATEN, JR., a/k/a Morris Gibson,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

(February 6, 1980)

Before GODBOLD, REAVLEY and ANDERSON, Circuit Judges.

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* Fed. R. App. P. 34(a); 5th Cir. R. 18.

Appendix A

PER CURIAM:

Appellant Staten was charged in a two-count indictment (1) with violating 18 U.S.C. § 659 by stealing or embezzling a truckload of rice that he had contracted to haul interstate from Houston, Texas to Seattle, Washington, and (2) with violating 18 U.S.C. § 2314 by transporting in interstate commerce from New Jersey to Houston the 1973 Great Dane trailer, which he knew to be stolen, into which the missing rice was loaded. The jury found Staten guilty on count one, the theft of the rice, but not guilty on count two, knowing interstate transport of the stolen trailer. The trial court entered judgment on this verdict, sentencing appellant to two years in prison. We affirm the conviction.

Appellant argues first that, since the rice allegedly was loaded into and carried in the stolen trailer, the jury verdicts are logically inconsistent and will not support the conviction, and that in any event the verdict of guilty on the theft of rice is against the weight of evidence. First, the verdicts need not be read as inconsistent. For example, two grounds of defense raised at trial by appellant were that the trailer was not stolen, but leased, and that in any event there was no proof that appellant knew the trailer to be stolen, as required by the statute. The jury's acceptance of either of these theories would produce an acquittal on the interstate transport charge but would in no way negate Staten's use of the trailer to steal the rice. Second, even if the finding of guilt on count one were logically inconsistent with acquittal on count two, such inconsistency would not undercut the conviction because each count is to be separately considered, and each verdict, if supported by the evidence, may stand. United States v. Romeros, 600 F.2d 1104, 1105 (5th Cir. 1979) (per curiam).

Appendix A

At trial several witnesses identified appellant as the trucker into whose rig the rice, identified by a discrete order number, had been loaded in Houston. The parties stipulated that this load never reached its Seattle destination. This evidence amply supports the jury verdict of guilt on the rice theft charge.

Appellant next contends that the trial court erred in submitting with its charge to the jury the indictment, captioned "United States of America vs. Frank C. Staten, Jr., a/k/a Morris Gibson." The driver into whose rig the missing rice was loaded in Houston identified himself and signed certain shipping documents as "Morris Gibson." Contending, therefore, that it was part of the government's burden to prove that appellant Frank Staten and the purported "Morris Gibson" were one and the same, appellant argues that he was impermissibly prejudiced by the submission of the indictment containing the caption "a/k/a Morris Gibson" and other references to the alias.

The use in an indictment of an alias, as well as a proper name, is permissible where there is ample evidence to identify the accused with use of that alias. United States v. Alfonso, 552 F.2d 605, 619 (5th Cir.), *cert. denied,* 434 U.S. 857 (1977). At trial two government witnesses testified that appellant identified himself to them as "Morris Gibson," and one testified that he observed appellant sign the bill of lading for the rice shipment as "Morris Gibson." *See* Gov't Exh. 5. Thus, appellant Staten was amply linked to the alias, "Morris Gibson."

Allowing the jury to take a copy of the indictment to the jury room is discretionary with the trial judge. United States v. Vicars, 467 F.2d 452, 456 (5th Cir. 1972), *cert. denied,* 410 U.S. 967 (1973). Submission of the indict-

ment containing references both to appellant's proper name and to an alias did not constitute an abuse of that discretion. *Accord,* United States v. Skolek, 474 F.2d 582, 586 (10th Cir. 1973) (per curiam) (upholding the trial court's compliance with jury request for copy of indictment which contained references to defendant's alias).

The conviction is, therefore, affirmed.

AFFIRMED.